SUPREME COURT NO. 82558-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

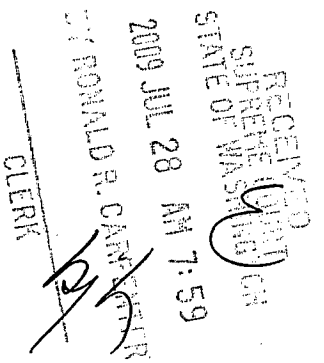
STATE OF WASHINGTON,

Respondent,

v.

ISIAH HALL,

Petitioner.



ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR KING COUNTY

The Honorable Richard D. Eadie, Judge

SUPPLEMENTAL BRIEF OF PETITIONER

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A. SUPPLEMENTAL ISSUE STATEMENT

Did Hall's multiple convictions for witness tampering, based on a course of conduct directed towards a single witness in a single proceeding, violate state and federal constitutional double jeopardy protections?

a. Did the legislature ambiguously define the unit of prosecution for tampering with a witness under RCW 9A.72.120?

b. May RCW 9A.72.120 reasonably be construed as punishing a course of conduct of attempting to induce a specific witness or person to obstruct justice in an official proceeding, rather than each act or "instance" comprising that course of conduct?

c. Does the rule of lenity require RCW 9A.72.120 to be construed according to the more lenient reasonable construction?

B. SUPPLEMENTAL STATEMENT OF THE CASE

Following a jury trial in King County Superior court, Isiah Hall was convicted of one count of first degree burglary while armed with a firearm, one count of second degree assault, one count of second degree unlawful possession of a firearm, and the three counts of tampering with a witness at issue here, counts 6, 7, and 8.[1] CP 67; 75-84.

The tampering charges stemmed from communications between Hall and his girlfriend Desirae Aquiningoc while Hall was

[1] The jury acquitted Hall of one count of second degree assault and one count of witness tampering. CP 64, 70.

in jail prior to his trial. CP 13-14. Count 6 charges that Hall "on or about March 22, 2007, did attempt to induce a witness Desirae Aquiningoc . . . to testify falsely or . . . withhold any testimony or absent herself [from the trial]." CP 13. Counts 7 and 8 alleged the same but with the dates of "on or about March 30, 2007," and "on or about April 4, 2007," respectively. CP 14.

At trial, Aquiningoc testified Hall called her from the jail telephone "[a]t least five times a day," and "almost every day." 3RP 384. Aquiningoc also visited Hall at the jail on several occasions. 3RP 391, 399, 400, 402. Aquiningoc testified Hall did not want her to come to court, and directed her to stay at his mother's house instead of going to court. 3RP 388. Aquiningoc claimed Hall told her what to say if she did testify, however:

> He wanted me to make up a story about where the gun -- who owned the gun. He wanted me to say it was a friend's of mine, and that he found it, and that he took it because he wanted to go and sell it.

3RP 392. Aquiningoc also testified that Hall instructed her to "[put] the subpoena that I got back into the mailbox," and to "go on a trip" so that the prosecutor "could not find me." 3RP 399-400.

While Aquiningoc was testifying, the state played recordings of telephone calls between Hall and Aquiningoc while Hall was in

jail. Ex. 22 and 23. Jurors were provided with a transcript of the calls. Ex. 24.

During closing argument, the prosecutor explained which statements formed the basis of each of the four witness tampering counts.[2] As the basis for count 6, the prosecutor directed the jury to rely on Hall's March 22 statement in which he allegedly told Aquiningoc: "You might have to do something for me . . . to get me out of here," and, "Everything I [have been] telling you to do I mean you know you gotta do it though baby okay?" Ex. 24 at 5, 8; 5RP 623. During that call, Hall also allegedly told Aquiningoc he would "let [her] know what to do and what to say." Ex. 24 at 5. At trial, Aquiningoc had explained that Hall was referring to an earlier conversation at the jail in which he tried to get her to falsify testimony. 3RP 392, 397. As the basis for count 7 the prosecutor directed the jury to rely on Hall's March 30 statement in which he allegedly told Aquiningoc to "go on a vacation for a minute." Ex. 24 at 14; 5RP 623. As the basis for count 8, the prosecutor directed the jury to rely on Hall's April 4 statement in which he allegedly told Aquiningoc: "[D]on't come to court." Ex. 24 at 15; 5RP 623.

C. SUPPLEMENTAL ARGUMENT

[2] Count 5 is not at issue.

HALL'S MULTIPLE CONVICTIONS FOR A SINGLE COURSE OF CONDUCT VIOLATE CONSTITUTIONAL DOUBLE JEOPARDY PROTECTIONS.

Division One concluded that Hall was properly convicted of three counts of tampering with a witness based on his contacts with Aquiningoc, holding that the statute unambiguously punishes a single act, rather than a course of conduct. State v. Hall, 147 Wn. App. 485, 489, 196 P.3d 151 (2008). This was error. The statute ambiguously defines the unit of prosecution, and Hall's interpretation of the statute as punishing a course of conduct directed towards an individual witness is at least as reasonable as the appellate court's construction. Under the rule of lenity, Hall's interpretation prevails.

Under the double jeopardy provisions of the United States and Washington constitutions, a defendant may not be convicted more than once under the same criminal statute if only one unit of the crime has been committed. U.S. Const. amend. V; Const. art. I, § 9; State v. Leyda, 157 Wn.2d 335, 342, 138 P.3d 610 (2006); State v. Tvedt, 153 Wn.2d 705, 710, 107 P.3d 728 (2005); citing State v. Westling, 145 Wn.2d 607, 610, 40 P.3d 669 (2002). The state constitutional provision, Wash. Const. art. I, § 9, offers the

same scope of protection as its federal counterpart. State v. Adel, 136 Wn.2d 629, 632, 965 P.2d 1072 (1998). The unit of prosecution is designed to protect the accused from overzealous prosecution. State v. Turner, 102 Wn. App. 202, 210, 6 P.3d 1226 (2000).

The unit of prosecution may be an act or a course of conduct. Tvedt, 153 Wn.2d at 710, citing United States v. Universal C.I.T. Credit Corp., 344 U.S. 218, 225-26, 73 S.Ct. 227, 97 L.Ed. 260 (1952); State v. Root, 141 Wn.2d 701, 710, 9 P.3d 214 (2000); Adel, 136 Wn.2d at 634. As this Court stated in Tvedt, the Court's role is to interpret the statute as it is written, and not to construe the statute in a manner that the Court determines to "best accomplish [the] evident statutory purpose." 153 Wn.2d at 710

Where the legislature has not defined the unit of prosecution with specificity, the Court should not interpret the statutory language as permitting multiple punishments. Tvedt, 153 Wn.2d at 711. Put differently, if the legislature fails to define the unit of prosecution or its intent is unclear, under the rule of lenity, any ambiguity must be resolved against turning a single violation into multiple offenses. Bell v. United States, 349 U.S. 81, 84, 75 S.Ct.

620, 99 L.Ed. 905 (1955); Universal C.I.T. Credit Corp., 344 U.S. at 221-22; Tvedt, 153 Wn.2d at 711; Adel, 136 Wn.2d at 634-35.

The witness tampering statute, RCW 9A.72.120(1), does not expressly define either an "act" or a "course of conduct" as the applicable unit of prosecution. RCW 9A.72.120(1) provides, in relevant part:

> A person is guilty of tampering with a witness if he or she attempts to induce a witness or person he or she has reason to believe is about to be called as a witness in any official proceeding or a person whom he or she has reason to believe may have information relevant to a criminal investigation or the abuse or neglect of a minor child to:
>
> (a) Testify falsely or, without right or privilege to do so, to withhold any testimony; or
>
> (b) Absent himself or herself from such proceedings; or
>
> (c) Withhold from a law enforcement agency information which he or she has relevant to a criminal investigation or the abuse or neglect of a minor child to the agency.

a. The Statute Is Ambiguous.

Division One concluded that RCW 9A.72.120 unambiguously defines the unit of prosecution as a single act, rather than a course of conduct. Hall, 147 Wn. App. at 489. However, the statute does not expressly define whether the unit of prosecution is a single act or a course of conduct, and the text reasonably supports either conclusion. The statute is ambiguous.

An appellate court engages in de novo review of the statutory unit of prosecution, a question of law. State v. Ose, 156 Wn.2d 140, 144, 124 P.3d 635 (2005). As this Court stated in State v. Varnell, 162 Wn.2d 165, 168, 170 P.3d 24 (2007):

> In a unit of prosecution case, the first step is to analyze the statute in question. Next, we review the statute's history. Finally, we perform a factual analysis as to the unit of prosecution because even where the legislature has expressed its view on the unit of prosecution, the facts in a particular case may reveal more than one "unit of prosecution" is present.

A statute is ambiguous if a reasonable person can interpret it in more than one way. State v. Watson, 146 Wn.2d at 954-55, 51 P.3d 66 (2002); State v. Keller, 143 Wn.2d 267, 276-77, 19 P.3d 1030 (2001); In re Charles, 135 Wn.2d 239, 249-50, 955 P. 2d 798 (1998). Appellate courts interpret and construe statutes to give effect to all the language used, with no portion rendered

meaningless or superfluous. In re Pers. Restraint of Skylstad, 160 Wn.2d 944, 948, 162 P.3d 413 (2007); Davis v. Dep't of Licensing, 137 Wn.2d 957, 963, 977 P.2d 554 (1999) (quoting Whatcom County v. City of Bellingham, 128 Wn.2d 537, 546, 909 P.2d 1303 (1996)); see State v. Young, 125 Wn.2d 688, 696, 888 P.2d 142 (1995). Words in a statute are given their plain and ordinary meaning, unless a contrary intent is evidenced in the statute. State v. Lilyblad, 163 Wn.2d 1, 7, 177 P.3d 686 (2008).

In drafting the witness tampering statute, the legislature did not expressly define the unit of prosecution as either a single act or a course of conduct. The statutory language appearing most relevant to defining the unit of prosecution is that defining the punishable act: "A person is guilty . . . if he or she ***attempts to induce***" a specifically defined class of individual to engage in specifically defined category of acts. RCW 9A.72.120. The principal issue regarding this language is whether the "attempts to induce" language relates to an "act" or a "course of conduct." Because the language may reasonably be construed in either fashion, the statute is ambiguous and must be construed in Hall's favor, under the rule of lenity.

The language and structure of RCW 9A.72.120(1) reveal that the primary purpose of the statute is to prevent obstruction of justice. See, e.g., State v. Stroh, 91 Wn.2d 580, 582, 588 P.2d 1182 (1979). The courts have consistently found that attempts to influence a witness to change his testimony or to absent himself from a trial or other official proceeding, necessarily have as their purpose, and naturally tend, to obstruct justice. Stroh, 91 Wn.2d at 582. Hall's interpretation of the statute is entirely consistent with these purposes and, therefore, reasonable.

The statute addresses behavior that a person could take to thwart the administration of justice in an official proceeding, and criminalizes the conduct of attempting to induce such behavior. The statutory language also focuses on a particular "witness or person," thereby contemplating the attempt to influence *a single individual*. State v. Victoria, 150 Wn. App. 53, 68-69, 206 P.3d 694 (2009) (RCW 9A.72.120 "contemplates that a particular witness will be the target of tampering"); see State v. Root, 141 Wn.2d at 710-11 (holding the legislature's use of the words "a minor" in the sexual exploitation of a minor statute, RCW 9.68A.040, meant that the defendant "may be charged per child involved"). In addition to focusing on a specific individual, the statutory language focuses on

"any official proceeding," meaning "every" official proceeding or "all" official proceedings.[3] State v. Sutherby, 165 Wn.2d 870, 882, 204 P.3d 916, 920 (2009) State v. Westling, 145 Wn.2d 607, 611-12, 40 P.3d 669 (2002). Thus, the statute can fairly be construed as prohibiting a course of conduct – the obstruction of justice – directed at a particular individual relating to any and every official proceeding.

Such a reading is supported by this Court's analysis in Root. 141 Wn.2d at 710-11. Root was convicted of 73 counts of sexual exploitation of a minor under RCW 9.68A.040, based on hundreds of photographs, rolls of film, and videotapes, he allegedly took depicting three children in sexually explicit poses. 141 Wn.2d at 703-04. The question before the Root Court was whether the unit of prosecution for the offense was each photograph, each pose, or each photo "session."

RCW 9.68A.040 states:

> (1) A person is guilty of sexual exploitation of a minor if the person:

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[3] RCW 9A.72.010(4) defines "official proceeding" as follows:

> A proceeding heard before any legislative, judicial, administrative, or other government agency or official authorized to hear evidence under oath, including any referee, hearing examiner, commissioner, notary, or other person taking testimony or depositions.

> (a) Compels a minor by threat or force to engage in sexually explicit conduct, knowing that such conduct will be photographed or part of a live performance;
>
> (b) Aids, invites, employs, authorizes, or causes a minor to engage in sexually explicit conduct, knowing that such conduct will be photographed or part of a live performance; or
>
> (c) Being a parent, legal guardian, or person having custody or control of a minor, permits the minor to engage in sexually explicit conduct, knowing that the conduct will be photographed or part of a live performance.

In analyzing the statute, this Court first noted its language did not appear to solely define the unit of prosecution as "per photograph." Root, 141 Wn.2d at 706. Second, this Court noted the statute basically consists of two elements: (1) posing a minor in sexually explicit conduct; and (2) knowing that the conduct will be photographed. Root, 141 Wn.2d at 777. With these elements in mind, this Court concluded the crime was arguably complete when the defendant merely causes a minor to engage in sexually explicit conduct, knowing that the defendant or someone else will take a photograph. Root, 141 Wn.2d at 707. Prior cases likewise supported the conclusion that "something more must be involved than simply taking a photograph." Root, 141 Wn.2d at 708. This Court concluded the unit of prosecution for RCW 9.68A.040 is

"engaging in activity that compels, aids, invites, employs, authorizes, or causes a minor to engage in sexually explicit conduct, while knowing such conduct will be photographed." Root, 141 Wn.2d at 708.

The next question the Root Court addressed was whether the punishable course of conduct is the photo session or the posing of the child. 141 Wn.2d at 709-710. It held it was the former, because it incorporated both the element of "affirmative act of assistance" resulting in sexually explicit conduct, plus the element of knowledge that the conduct will be photographed. Root, 141 Wn.2d at 710.

The framework of the witness tampering statute is similar to that of the sexual exploitation of a minor statute. The sexual exploitation statute penalizes a person who (1) "compels," "aids," or "permits" a minor to engage in sexually explicit conduct while (2) knowing the conduct will be photographed. Similarly, the witness tampering statute penalizes a person who (1) "attempts to induce" a person to engage in certain proscribed conduct while (2) knowing that person is a witness or a potential witness. See Stroh, 91 Wn.2d at 583, 586 (RCW 9A.72.120 impliedly, if not explicitly, requires knowledge the person approached is a witness or a

potential witness). Accordingly, just as the unit of prosecution for sexual exploitation of a minor is a course of conduct of engaging in activity that affirmatively leads a minor to engage in sexually explicit conduct knowing the minor will be photographed, the unit of prosecution for witness tampering is a course of conduct of attempting to induce a witness to testify falsely or absent himself from any official proceeding, knowing that the individual is a witness or a potential witness. See also, Leyda, 138 Wn.2d at 345 (once the accused has engaged in any one of the statutorily proscribed acts against a particular victim, and thereby committed the crime of identity theft, the unit of prosecution includes any subsequent proscribed conduct against same victim).

Indeed, a California court reached a similar conclusion, finding that the statutory language of its tampering statute indicated that the unit of prosecution was a continuing course of conduct, not a single act. People v. Salvato, 285 Cal. Rptr. 837, 234 Cal. App.3d 872 (1991). Section 136.1 of the California Penal Code is divided into three relevant subdivisions. Subdivision (a)(1) subjects to misdemeanor liability to one who "[k]nowingly and maliciously prevents or dissuades any witness or victim from attending or giving testimony at any trial, proceeding, or inquiry authorized by

law." Cal. Penal Code § 136.1. Subdivision (a)(2) extends liability to attempts at prevention or dissuasion. Cal. Penal Code § 136.1. Subdivision (c)(1) makes the offense a felony "[w]here the act is accompanied by force or by an express or implied threat of force or violence." Cal. Penal Code § 136.1.

The Salvato court reasoned that the language used in the statute reflected the possibility or likelihood that the actions comprising the crime would occur over a period of time:

> "Prevent" and "dissuade" denote conduct which can occur over a period of time as well as instantaneously. The gravamen of the offense is the cumulative outcome of any number of acts, any one of which alone might not be criminal. Thus it falls within the continuous conduct exception.

285 Cal. Rptr. at 843. The Salvato court further explained that crimes constitute "continuous conduct" when the statute contemplates a series of acts over a period of time. 285 Cal. Rptr. at 843. The Salvato court, accordingly, reversed one of the defendant's two convictions for violating that statute as multiplicitous.

The language of Washington's witness tampering statute supports a similar conclusion – that the legislature intended to punish a course of conduct aimed at obstructing justice, rather than

each individual action taken in furtherance of that objective. Like "prevent" and "dissuade," the "attempts to induce" language denotes conduct that can occur over a period of time as well as instantaneously. And the gravamen of the offense is the cumulative outcome of the efforts undertaken to induce a witness to behave in a certain manner – namely, the obstruction of justice. Such a reading of RCW 9A.72.120 is reasonable.

The lone case relied on by Division One in holding otherwise is State v. Moore, 292 Wis.2d 101, 116, 713 N.W.2d 131 (2006). See Hall, 147 Wn. App. at 489-90. However, that case applies the law of Wisconsin, which begins with a presumption that the legislature intends multiple punishments. The Moore court expressly states:

> [W]e begin with the presumption that the legislature intended multiple punishments. This presumption may only be rebutted by a clear indication to the contrary.

713 N.W. at 137.

Such a presumption does not exist under Washington law, and is contrary to the rule of lenity. Under Washington law, where the legislature has not defined the unit of prosecution with specificity, the Court should not interpret the statutory language as permitting multiple punishments:

> When choice has to be made between two readings of what conduct [the legislature] has made a crime, it is appropriate, before we choose the harsher alternative, to require that [the legislature] should have spoken in language that is clear and definite. We should not derive criminal outlawry from some ambiguous implication.

Tvedt, 153 Wn.2d at 711, quoting Universal C.I.T. Credit Corp., 344 U.S. at 221-22. Division One's analysis vitiates this State's requirement that the legislature set forth the harsher alternative clearly and definitely before the Court chooses that interpretation.

Furthermore, the Hall Court expressly based its conclusion that Hall's interpretation was not reasonable upon *its own determination* about which of two interpretations appeared to better "serve the legislative purpose." 147 Wn. App. at 489. In doing so, the Hall Court expressly looked beyond the language of the statute, the statute's history, and the facts of the case, and attempted to construe the statute in a manner that it deemed would accomplish the legislature's objectives. As this Court stated in Tvedt, the Court's role is to interpret the statute as it is written, and not to construe the statute in a manner that the Court determines to "best accomplish [the] evident statutory purpose:"

> In determining legislative intent as to the unit of prosecution, we first look to the relevant statute. The meaning of a plain, unambiguous statute must be

> derived from the statutory language. However, we are not allowed to look for an intent that reasonably could be imputed to the legislature, nor are we permitted to construe an Act in a way that we believe will best accomplish evident statutory purpose.

153 Wn.2d at 710 (internal citations, quotation marks and brackets omitted); see also, Varnell, 162 Wn.2d at 168 (In a unit of prosecution case, the Court analyzes the statutory language, the statute's history, and the facts in the case).

Because the language of RCW 9A.72.120(1) is susceptible to more than one reasonable interpretation, it is ambiguous. Watson, 146 Wn.2d at 954-55. The ambiguity must be construed in Hall's favor, as punishing a course of conduct, rather than each individual "instance" within that course of conduct. Adel, 136 Wn.2d at 634-35.

b. The State's Interpretation Ignores the Statutory Language.

In support of its contrary construction, the state below relied primarily on the criminal "attempt" statute, RCW 9A.28.020(1), which defines criminal attempt as "any act which is a substantial step toward the commission [of a specified crime and done with the requisite intent]." Brief of Respondent (BOR) at 12-13 (emphasis in

Respondent's Brief). But the Hall court found unpersuasive the state's reliance on the criminal attempt statute.[4] And rightly so.

First, Hall was not charged with violating RCW 9A.28.020; its terms are inapplicable to a violation of the witness tampering statute. See, State v. Brown, 50 Wn. App. 873, 877, 751 P.2d 331 (1988) (Definition of the word "building" in the context of burglary statutes does not apply in the context of criminal trespass statutes). The crime of attempt is contained in RCW chapter 9A.28, which concerns "Anticipatory Offenses," whereas witness tampering is contained in RCW chapter 9A.72, which concerns "Perjury and Interference with Official Proceedings." Unlike the term "attempt" in the criminal attempt statute, the word "attempts" is not expressly defined in the witness tampering statute. The definition of criminal "attempt" in the context of an unrelated, anticipatory offense, does not apply to the tampering statute.

Second, the "attempt" applicable to the inchoate crime is a noun; whereas the "attempts" applicable to the witness tampering statute is a verb. The definition of the noun "attempt" in RCW 9A.28.020, thus, does not fit the verb "attempts" in the witness

[4] Hall, 147 Wn. App. at 489, n. 8 ("The State contends the definition of 'criminal attempt' in RCW 9A.28.020(1) applies to 'attempt' as used in RCW 9A.72.120, but we do not find this approach helpful.")

tampering statute. There is, therefore, no indication from the statute that the definition of criminal attempt applies to witness tampering.

Although the criminal attempt statute is not applicable to construing the witness tampering statute, it is nevertheless instructive so far as it demonstrates that the legislature can define a unit of prosecution for the crime of attempt specifically as an "act." The fact that the legislature can do so, but chose not to do so in the witness tampering statute suggests it did not intend to define the unit of prosecution for that crime as a single act.

The state may point out that Division Two previously upheld a defendant's two convictions for witness tampering based on two telephone calls to a single witness in a single proceeding. See State v. Whitfield, 132 Wn. App. 878, 134 P.3d 1203 (2006). However, that case addressed only a challenge to the sufficiency of the evidence, and did not address a claim of double jeopardy. Whitfield, 132 Wn. App. at 897-898. In cases where a legal theory is not discussed in the opinion, that case is not controlling on a future case where the legal theory is properly raised. See Webster v. Fall, 266 U.S. 507, 511, 45 S. Ct. 148, 149, 69 L. Ed. 411 (1925) (questions which merely lurk in the record but are neither brought to

a court's attention nor ruled upon are not considered to have been decided so as to constitute precedent).

Hall's interpretation of the statutory language is reasonable. The statute is ambiguous.

c. The Legislative History Supports Hall's Interpretation.

The Hall court did not evaluate the legislative history of the witness tampering statute. See Hall, 147 Wn. App. at 489-90. In support of Division One's construction, however, the state may refer to legislative history indicating the legislature considers the offense to be "grave" and contrary to the state's interests in promoting public safety or prosecuting criminals. However, these findings are just as consistent with Hall's interpretation. See BOR at 14.

There is no dispute that under Hall's interpretation, the act of witness tampering is proscribed and made punishable by the law. Each potential witness an individual attempts to induce to thwart justice is accounted for and the harm to that person as well as the proceeding itself is recognized.

At the same time, Hall's construction avoids an absurdity that would result from the state's and appellate court's construction.

For instance, under the Hall court's construction, the state could charge an individual ad infinitum for each time he or she requests a potential witness to do one of the listed actions, even in the same sentence, meeting, letter, or phone call. After all, each such action is an "instance" of an attempt to induce a witness. But this Court has held the state cannot skirt double jeopardy protections by breaking a single crime into temporal or spatial units. Adel, 136 Wn.2d at 635 (citing Brown v. Ohio, 432 U.S. 161, 169, 97 S. Ct. 2221, 53 L.Ed.2d 187 (1977)). Yet, Division One's holding that the unit of prosecution for tampering with a witness is "any one instance of attempting to induce a witness" allows for just such a breaking down of a single crime into smaller temporal units. It also permits overzealous prosecution, contrary to the purpose of the unit of prosecution. See, e.g., Turner, 102 Wn. App. at 210. This is an absurd result the legislature could not have intended.

d. The Facts of the Case Reveal Only One Course of Conduct.

The facts of the case show a single course of conduct directed at Aquiningoc, a single witness in a single proceeding. All of the alleged conversations had the same objective and intent – to obstruct justice in Hall's trial. Although the state argues Hall

"formed a new intent [. . .] each time he attempted to persuade Aquiningoc to change her testimony or absent herself from trial," such a question was not put to the jury. BOR at 18. Nor does the state explain why Hall's intent would be "new" each time he allegedly requested Aquiningoc to do the same act. These facts demonstrate only one single course of conduct, the alleged objective of which was the obstruction of justice in a single proceeding, by a single witness.

In its briefing, the state might alternatively argue that the unit of prosecution is "per witness, per type of tampering at issue" (*i.e.*, falsify or withhold testimony, absent oneself from the proceeding, *etc.*). See, e.g., State v. Lobe, 140 Wn. App. 897, 902-03, 167 P.3d 627 (2007) (recognizing "three alternative means of committing witness tampering" based on statutory subdivisions). Hall maintains the unit of prosecution proscribes a continuing course of conduct aimed at inducing a particular individual to obstruct justice in any proceeding. But even if the statute creates alternate means of committing the offense, the facts here support only one charge, under this Court's reasoning in Leyda. 157 Wn.2d at 345. In Leyda, this Court held that once the accused has engaged in any one of the statutorily proscribed acts of identity theft

against a particular victim, the unit of prosecution includes any subsequent proscribed conduct against same victim. 157 Wn.2d at 345. Similarly, in this case, once Hall allegedly committed the first act proscribed by the witness tampering statute in relation to Aquiningoc, the unit of prosecution includes his subsequent proscribed acts concerning Aquiningoc. Leyda, 157 Wn.2d at 345. The alleged facts of this case demonstrate violation of only a single unit of prosecution.

e. The Rule of Lenity Applies.

Under the rule of lenity, any ambiguity must be resolved against turning a single violation into multiple offenses Bell, 349 U.S. 81; Universal C.I.T. Credit Corp., 344 U.S. at 221-22; Tvedt, 153 Wn.2d at 711; Adel, 136 Wn.2d at 634-35.

The language of RCW 9A.72.120 does not unambiguously demonstrate legislative intent to punish a single act, rather than a course of conduct. An interpretation of the statute as proscribing a course of conduct directed toward a single witness to a proceeding is consistent with the purpose of punishing an obstruction of justice, the statutory language, the legislative history, and the facts of this case. Because the statute is ambiguous and Hall's interpretation is reasonable, Hall's interpretation prevails.

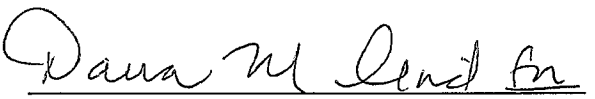
D. CONCLUSION

This Court should reverse the Court of Appeals, and remand the case to the trial court with directions to vacate two of the tampering counts and to resentence Hall on the remaining counts.

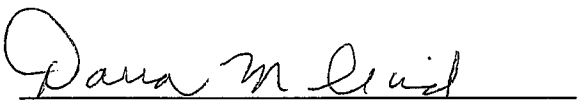
Dated this 27th day of July, 2009.

Respectfully submitted

NIELSEN, BROMAN & KOCH



JONATHAN M. PALMER, WSBA 35324



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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	
v.	)	NO. 82558-1
	)	
ISIAH HALL,	)	
	)	
Petitioner.	)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 27TH DAY OF JULY, 2009, I CAUSED A TRUE AND CORRECT COPY OF THE **SUPPLEMENTAL BRIEF OF PETITIONER** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] KING COUNTY PROS/APPELLATE UNIT SUPERVISOR
W554 KING COUNTY COURTHOUSE
516 THIRD AVENUE
SEATTLE, WA 98104

[X] ISIAH HALL
DOC NO. 309022
COYOTE RIDGE CORRECTIONS CENTER
P.O. BOX 769
CONNEL, WA 99326

SIGNED IN SEATTLE WASHINGTON, THIS 27TH DAY OF JULY, 2009.

x Patrick Mayovsky